



Republican Policy Committee

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Hawaii's Same-Sex "Marriages" and Federal Law

The people of Hawaii, through their legislature and the courts, are deciding if their state is going to sanction the legal union of persons of the same sex. If they grant that sanction, the implications will be felt far beyond Hawaii's idyllic shores. Because Article IV of the U.S. Constitution requires every state to give "full faith and credit" to the "public Acts, Records, and judicial Proceedings" of each state (and because of other legal doctrines), the other 49 states will be faced with recognizing Hawaii's same-sex "marriages", which no state now does. The federal government will have similar concerns because it extends benefits and rights and privileges to persons who are married, and generally it accepts a state's definition of marriage.

Marriage in the Federal Code. Hawaii's decision could have an enormous effect on the federal government. The word "marriage" appears in 127 sections of the United States Code, and the word "spouse" appears in 703 sections. In the Code of Federal Regulations, the word "marriage" appears in 579 sections and the word "spouse" appears in 2,467 sections. If Hawaii gives new meaning to those words, the reverberations will be felt throughout the country. To take a concrete example (discussed more fully below), the federal government may find itself paying veterans' benefits to same-sex "spouses". Multiply this example by hundreds of other federal programs and benefits and it becomes apparent that the moral implications are scarcely more ominous than the fiscal and policy ones.

Same-Sex "Marriages" and Veterans' Benefits

When Richard Is a Veteran, Can James Be His "Dependent Spouse"? Richard John Baker of Minnesota received education assistance from the federal government because he is a veteran. The program provides additional assistance if the veteran has dependents. Under current law, for example, an eligible veteran in a full-time educational program is entitled to \$376 per month if he has no dependents but \$448 per month if he has one dependent. Baker, a male, petitioned the Veterans Administration (VA) for increased assistance, claiming that James Michael McConnell, another male, was his dependent spouse. The VA turned him down.

Baker and McConnell had applied for a marriage license in 1970 in the State of Minnesota but were denied by a county clerk. They sued in state court, but while their suit was pending they obtained a license in another county and were "married" by a minister in early September 1971. Six weeks later, saying that Minnesota's statute used the word "marriage" in its common sense ("the state of union between persons of the opposite sex"), the State Supreme

Court held that same-sex "marriages" are prohibited by Minnesota law. The court also held that the statute so construed did not violate the U.S. Constitution. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *dismissed for want of a substantial federal question*, 409 U.S. 810 (1972).

Federal Benefits Predicated on State Law. Meanwhile, after making various administrative appeals within the Veterans Administration, Baker and McConnell sued in federal court to obtain the additional benefits. Their entitlement to those added benefits turned on an interpretation of 38 U.S.C. §103(c), which now reads,

"In determining whether or not a person is or was the spouse of a veteran, their marriage shall be proven as valid for the purposes of all laws administered by the Secretary according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued."

The federal courts held that Minnesota law was dispositive. Since "marriages" between persons of the same sex were prohibited in Minnesota, McConnell could not be Baker's "spouse" under 38 U.S.C. 103(c). *McConnell v. Nooner*, 547 F.2d 54 (8th Cir. 1976).

Will the Insular Tail Wag the Continental Dog? If Hawaii sanctions same-sex "marriage", and if a Baker and a McConnell team up in Hawaii, then the result in any future case might very well be different from that in *McConnell v. Nooner*. Hawaii's action may or may not make its same-sex couples automatically entitled to veterans' benefits and other federal benefits, but if it sanctions same-sex marriages there will be reverberations throughout the federal code.

For as long as there have been veterans' benefits, no Congress has anticipated that a James McConnell could be the dependent spouse of a Richard Baker, but if Hawaii acts, Congress is going to have to consider if that tiny, tropical tail will wag the vast, populous, continental dog. And, veterans' benefits are only a small part of the enormous American enterprise that might be changed — even revolutionized — by those twitches in the tropics.

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[Law Notes: [1] On "full faith and credit", see statutory provisions at 28 U.S.C. §§1738, 1739 (1994 ed.); also see, 28 U.S.C. §1738A (child custody) & §1738B (child support). [2] Baker received his veterans' educational benefits under what was then 38 U.S.C. §1682, now codified at 36 U.S.C. §3482 (1994 ed.). [3] Before 1986, subsection 103(c) began, "In determining whether or not a woman is or was the wife of a veteran, their marriage shall be proven. . . ." [4] Where, as in *Baker v. Nelson*, an appeal is dismissed for "want of a substantial federal question" the Court is making a decision on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). [5] In attempting to qualify for veterans' dependents' benefits, same-sex couples will be faced with the VA's definition of spouse as "a person of the opposite sex who is a wife or husband", 38 U.S.C. §101(31) (1994 ed.), which was added to the Code in 1975, perhaps in response to the Minnesota lawsuits. Note, though, that when the State of Hawaii argued in the leading case that the "right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman," the Hawaii Supreme Court rejected the argument as "circular and unpersuasive." *Baehr v. Lewin*, 852 P.2d 44, 48 (Haw. 1993).]